

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10451 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes
2. To be referred to the Reporter or not? Yes
3. Whether Their Lordships wish to see the fair copy of the judgement? No
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No
5. Whether it is to be circulated to the Civil Judge? No.

CHANDUBHAI DAHYABHAI RAJPUT

Versus

STATE OF GUJARAT

Appearance:

MR RS SANJANWALA for Petitioner
MR GM JOSHI for Respondent No. 6
MR NV ANJARIA for Respondent No. 2
MR BD DESAI , AGP, for Respondent No. 1& 3
MR YN OZA for Respondent No. 4, 5, 6

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: 09/07/97

CAV JUDGEMENT

The petitioner has filed the present petition under Article 226 of the Constitution of India and has prayed for issuance of a writ of prohibition or any other appropriate writ, order or direction restraining

respondents Nos.1,2 and 3 from accepting the nominations of respondents Nos.4,5 and 6 for the election to the office of the President. The petitioner belongs to backward class and was elected as a member of Jambusar Nagarpalika during the last election from a seat reserved for candidates belonging to backward class. By the Constitution 174th Amendment Act, 1992, Article 243-T is inserted in the Constitution providing for reservation of seats for Scheduled Castes, Scheduled Tribes etc. Pursuant to the constitutional amendment, the provisions of the Gujarat Municipalities Act, 1963 have been amended to provide for reservation in favour of Scheduled Castes, Scheduled Tribes, Backward Classes and Women. In exercise of powers conferred by sub-section (1) of Section 277 read with sub-section (3) of Section 33 of the Gujarat Municipalities Act, 1963, the Government of Gujarat has made Rules known as "The Gujarat Municipalities (Reservation of SC,ST,BC and Women for the Office of the President) Rules, 1994. Rule 2 of the Rules provides that office of the President of Municipality shall be reserved in favour of the Scheduled Castes, Scheduled Tribes, Backward Classes and Women in accordance with the roster shown in the Schedule. After the elections, which were held in the year 1994, for the year commencing from January 17, 1995 and ending on January 16, 1996, Smt. Khatijaben Pathan was elected as President of Jambusar Nagarpalika and thereafter for the year beginning from January 17, 1996 and ending on January 16, 1997 Shri Sikanderbeg Mirza was elected as President of the said Nagarpalika. In view of the roster shown in the Schedule appended to the Gujarat Municipalities (Reservation of SC,ST, BC and Women for the Office of the President) Rules, 1994 a person belonging to Backward Class is entitled to hold the office of President of Municipality. The election to the office of President of Municipality was scheduled to take place on January 16, 1997. The petitioner being eligible, contested the election for the said post. The petitioner reliably learnt that respondents Nos.4,5 and 6 who are elected as members of Municipality from the seats meant for general category, were likely to contest the election for the office of President and respondent No.3 was likely to permit them to contest the said election by accepting their nominations. The claim of the petitioner was that as respondents Nos.4,5 and 6 are not elected as members of the Municipality from the seats reserved in favour of the Backward Class, they were not entitled to contest the election for the office of President.

When the petition came up for hearing as to admission before brother M.S.Parikh,J on December 23,

1996, notice was issued making it returnable on January 6, 1997. On service of the notice, respondent No.6 filed affidavit in reply on behalf of respondents Nos.4 to 6 and controverted the statements made in the petition. At the time of hearing of the petition, it appears, it was brought to the notice of the Court that in Special Civil Application No.649 of 1996 decided on June 27, 1996, brother N.N.Mathur,J has taken a view that a person belonging to Scheduled Caste, Scheduled Tribe, backward class or women not elected from the seats reserved in favour of the SC, ST, BC and Women is entitled to contest the election for the office of the President of the Municipality. In view of the said decision, brother J.M.Panchal,J dismissed the petition on January 13, 1997.

The petitioner, it appears, thereafter filed a review application being Miscellaneous Civil Application No.274 of 1997 relying upon the decision of the Supreme Court in the case of Saraswati Devi vs Shanti Devi, (1997) 1 SCC 122 wherein the Supreme Court has ruled that by virtue of rotation President is to be elected from amongst the members belonging to SC category, persons elected as members of the Committee from any other category (general, backward, women) even if they belong to SCs, would be excluded from the contest for election of President. It was, therefore, contended by the petitioner that the view expressed by the Supreme Court in the above petition filed by the petitioner being contrary to the interpretation placed by the Supreme Court in the above referred decision, the impugned judgment deserves to be reviewed. Brother Panchal,J., heard the said review application on February 7, 1997 and after hearing the learned counsel for the petitioner, notice was issued making returnable on February 12, 1997. Thereafter, by an order dated February 25, 1997 Rule was issued in the application making it returnable on March 19, 1997. K.F.Ganchi, respondent No.4 in the review application (original respondent No.6) filed affidavit in reply controverting the averments made in the application, but no affidavit in reply was filed by any other respondents controverting the averments made in the application. Brother J.M.Panchal,J, after considering the arguments advanced by the parties, and considering the law laid down by the Supreme Court in Saraswati Devi's case (supra) has taken a view that having regard to the provisions of Article 243-T of the Constitution read with rules, there is no manner of doubt that the ratio laid down by the Supreme Court in the case of Saraswati Devi's case (supra) would be applicable to the facts of the present case and has, therefore, held that

respondent No.4 (original respondent No.6) was not entitled to contest the election for the office of the President of the Municipality as he was not elected on a seat reserved for candidates belonging to backward class and accordingly allowed the review application by his judgment dated March 20, 1997. Consequently, the order dated January 13, 1997 challenged in the present petition was set aside and the office was directed to place the matter before the appropriate Court for admission and hearing. Against the said order, respondent No.6 preferred an appeal being Letters Patent Appeal No.348 of 1997. A Division Bench (Coram:C.K.Thakkar and H.L.Gokhale,JJ) on 3-4-97 dismissed the appeal. The said respondent No.6 carried the matter to the Supreme Court challenging the judgment delivered in the Letters Patent Appeal by way of Special Leave Petition (Civil) No.9061 of 1997. On 1-5-97, the Supreme Court permitted withdrawal of the said SLP by passing the order : "Special Leave Petition dismissed as withdrawn on the statement of the learned counsel for the petitioner."

In pursuance of the order passed by this Court (Coram:J.M.Panchal,J), the main petition was placed before brother D.G.Karia,J on 17-4-97. The petitioner filed draft amendment which was granted and the Court issued Rule making it returnable on 28-4-97. By way of draft amendment, the petitioner has produced the copy of the order passed in review application, the judgment rendered by the Supreme Court in the case of Saraswati Devi (supra) and the order passed by the Division Bench in the LPA. Over and above this, the petitioner has prayed for a writ of quo-warranto as according to the petitioner, respondent No.6 has not been elected as a member of Jambusar Nagarpalika from the reserved seat and was, therefore, not entitled to contest for the post of President of the Nagarpalika and is, therefore, not entitled to hold the said post. Since respondent No.6, having contested for the post and having been declared elected, has usurped the post of President, he is not entitled to continue as such. The said amendment was necessitated for the reason that when the petition was filed, it was with a prayer to restrain respondent No.6 from contesting the election with a request that his nomination form may not be accepted but since no interim relief was granted, though prayed for, the present petition for a writ of quo-warranto removing respondent No.6 from the office of the President of the Nagarpalika is necessary. The petitioner has accordingly amended the petition and added the prayers (AA) and (CC).

Since the petition was not heard even though a

specific date was fixed , the petitioner has filed Civil Application No.4576/97 with a prayer to issue a mandatory interim order removing respondent No.6 from the office of the President of Jambusar Nagarpalika and/or directing him not to hold the post of and discharge functions as the President of the Nagarpalika. This Court, with the consent of the learned Advocates, instead of deciding the application, heard the main matter finally.

Mr. S.H.Sanjanwala, learned counsel appearing for the petitioner has submitted that in view of the judgment rendered by this Court , which was carried upto Supreme Court, the rights of the parties are settled, inasmuch as respondent No.6 being not elected on the seat reserved for the candidates belonging to Backward class, he was not entitled to contest the election to the office of the President of the Municipality . He, therefore , submitted that he is not entitled to continue to hold the post of President and, therefore, a writ of quo-warranto be issued against him.

Mr. G.M.Joshi, learned counsel appearing for respondent No.6, on the other hand, just for the sake of arguments, has tried to contend that the judgment pronounced by the Supreme Court in Saraswati Devi's case (supra) is based on the interpretation of Haryana Municipal Election Rules, 1978 and as the Rules framed by the State of Gujarat are quite different from those Rules, the ratio laid down in Saraswati Devi's case (supra) by the Supreme Court would not be applicable to the facts of this case.

In my view, Mr. Joshi is not right in raising the said contention in view of the judgment rendered in the Review Application delivered by brother J.M.Panchal,J. Very argument was advanced before him, which was negatived. A specific finding was recorded that having regard to the provisions of Article 243-T of the Constitution of India read with the Reservation Rules framed by the State Government, there is no manner of doubt that the ratio laid down by the Supreme Court in Saraswati Devi's case (supra) would be applicable to the facts of the present case as the provisions of Rule 70 (4) framed by the Haryana Government are almost identical. It was also observed that this Court cannot refuse to follow mandate of the Supreme Court on so-called hyper technical ground that there is difference in language employed in Haryana Rules and Gujarat Rules. In any case, as stated hereinabove, once the judgment given by this Court in Review Application is confirmed in the Letters Patent Appeal, which was carried by way of

Special Leave Petition in the Supreme Court and the same was withdrawn, it is now not open to respondent No.6 to re-agitate the said question in the main petition. I, therefore, find no substance in the submission of Mr. Joshi, and hence, it is rejected.

Mr. Joshi, learned Advocate appearing for respondent No.6, after inviting my attention to Article 243-ZG of the Constitution of India, submitted that the petition itself is not maintainable. In his submission, as per the language of Article 243-ZG of the Constitution, there is a bar to interference by courts in electoral matters and the only remedy available to the petitioner is to go by way of an Election Petition before the competent authority. In support of his submission, he has relied on the decisions of the Supreme Court in (i) State of U.P. and ors vs Pradhan Sangh Kshetra Samiti 1995 Supp (2) SCC 305; (ii) Boddula Krishnalah and another vs. State Election Commissioner, A.P. and ors (1996) 3 SCC 416 and (iii) Anugrah Narain Singh and another vs. State of U.P. and ors, (1996) 6 SCC 303. Article 243-ZG reads as under:

"243-ZG. Bar to interference by courts in electoral matters - Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243-ZA shall not be called in question in any court;

(b) no election to any Municipality shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State."

There cannot be any dispute reading the provisions of Article 243-ZG of the Constitution that there is a bar to interference by courts in electoral matters and the only remedy available to the party is to go by way of election petition before the competent authority. However, whether the election of the President can be challenged before the authority by way of Election Petition under section 14 of the Gujarat Municipalities Act, which deals with the determination of

the validity of election of councillors, is a question which was argued at length before me, as according to the petitioner, the alternative remedy by way of Election Petition is not available to him, which is refuted by respondent No.6.

After having heard the learned counsel on this point, assuming that an alternative remedy is available to resolve the election dispute, I fail to understand as to why and for what purpose the petitioner should be relegated to the authority under the Act ? The High Court, while exercising equity jurisdiction under Article 226 of the Constitution, is also required to consider various circumstances before asking a party to first avail of the alternative remedy, namely:

(1) Whether such a contention is raised in the reply affidavit and was, in fact, advanced before the Court in the first instance ? Many a times, a party, without raising contention in the reply affidavit and also without arguing the same, expects the Court to enter into the merits of the case and when the decision goes against it, challenges the same on the ground of jurisdiction. With a view to avoid multiplicity of proceedings and waste of public time, it is necessary that the Court should be informed at the very first available opportunity that the alternative remedy, other than writ petition, is available. I am conscious of the fact that the question of jurisdiction need not be pleaded in the very first instance as the same can be raised at any time. However, with a view to prevent a party, watching the proceeding from the fence, from using the Court as a lever to achieve its purpose by raising the contention of jurisdiction at a later stage when it failed to get result in its favour. If a party is serious in getting decision on the point of jurisdiction, the Court also can, without wasting its time and deciding the case on merits, straight way direct the concerned party to take recourse to the alternative remedy.

(2) Whether the dispute regarding alternative remedy is bonafide and (3) Whether the facts and circumstances warrant the Court to relegate the party to the alternative remedy ? Considering the case on hand with these view points, I am clearly of the opinion that by raising the dispute about the alternative remedy at this stage, respondent No.6 is trying to achieve his own purpose i.e. to remain in power as President of the Municipality till the term is over. Respondent No.6 in

the petition as well as in the review application has not raised the contention of the alternative remedy, nor argued the same and thereby allowed this Court to proceed on merits. He thus virtually waived his right and accepted the jurisdiction of this Court to decide the issue. Having succeeded in getting the order of dismissal of the writ petition on merits, he could as well have raised the contention of the alternative remedy in the review application. As stated above, this Court, after relying on the decision of the Supreme Court in Saraswati Devi's case (supra) allowed the review application. Respondent No.6, unsuccessfully challenged the said decision in the Letters Patent Appeal and the Special Leave Petition with an obvious intention to while away time so that he can complete his term as President. When only few months of the term have remained, what purpose will it serve to ask the petitioner to go to the authority by way of election petition? When the rights of the parties are already settled, where is the dispute and what is to be decided? Even if the petitioner is relegated to the authority, is the authority going to decide against the settled legal position in the decision of the Supreme Court? The answers, obviously would be in the negative. In view of this, I feel that the dispute raised by respondent No.6 is not bonafide. Raising this dispute at such a belated stage is nothing but an attempt to have a second round of litigation with an oblique purpose. In view of this, I find no merit in the contention and the same is rejected. The judgments cited by Mr. Joshi will have no application on the facts and in the circumstances of the case, especially when in view of the decision of the Supreme Court in Saraswati Devi's case (supra) which is directly applicable to the facts of the present case.

In view of the aforesaid discussion, the petition is allowed. It is declared that respondent No.6 is not entitled to hold the office of the President of Jambusar Nagarpalika as he is not elected from the reserved seat belonging to Backward class and therefore was not entitled to contest for the office of the President of the Jambusar Nagarpalika. A writ of quo-warranto shall therefore be issued removing respondent No.,6 from the office of the President, Jambusar Nagarpalika forthwith. Respondents Nos.2 and 3 are directed to take appropriate steps for filling in the post of President, Jambusar Nagarpalika in accordance with law forthwith. Rule is made absolute to the aforesaid extent with costs which is quantified at Rs.5000/- to be paid by respondent No.6.

At this stage, Mr. Joshi prays for the stay of

this order for a period of four weeks. In view of the fact that the question involved herein is now settled, I do not see any reason to accede to the request made by Mr. Joshi . Hence rejected.

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